IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, Federal Security Administrator, ET AL.,
Appellants-Respondents,

v.

MYTINGER & CASSELBERRY, INC.,
Appellee-Petitioner

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Now comes Mytinger and Casselberry, Inc., and prays that this Honorable Court grant it a rehearing in the above entitled case for the following reasons:

1. Under the Majority Opinion Discretion May Be Abused With Impunity; the Act May Be Enforced With Caprice; a Lawful Business May Be Arbitrarily Destroyed; and a Court of Equity Is Prohibited From Preventing the Wrong.

The Majority Opinion vests final responsibility for multiple seizures under the Food, Drug and Cosmetic Act in the Attorney General of the United States. It holds such seizures can be made in his "discretion" and recognizes that this discretion "may be abused." This "discretion" is found in the general powers of the Attorney General to in-

stitute litigation in the name of the United States and is not found in the Food, Drug and Cosmetic Act. The Opinion refers to the statutory "prerequisite" which Congress has prescribed for the filing of multiple seizure actions but holds in effect that a Court of equity cannot stop the Attorney General and his co-respondents from violating this Congressional mandate no matter how grossly he abuses his "discretion" thus conferred and thus supposedly limited by the Congress. These unusual statutory provisions and the unique facts herein sets this case apart from all others, but the majority of the Court gives no consideration to these factors or to the consequences of its decision in placing in the hands of Respondents an uncontrollable destructive power unparalleled in the history of this Nation.

The Opinion stops short of considering the Findings of Fact of the Court below that the Attorney General has inflicted and threatens further irreparable injury upon Petitioner by arbitrary, capricious, oppressive and unlawful action. The lower Court found that the Attorney General and his co-respondents filed seizure actions in a carefully calculated nation-wide plan for punishment purposes (R. 763-764, 768-769) and that they threaten further punishment through seizures designed to destroy Petitioner's "business prior to any possible adjudication of the disputed issues. . . in any of the libel actions." (R. 769-770). The Opinion does not disagree with said Findings of Fact but holds the lower Court without power to lend its aid to rectify or prevent the wrong.

It is most respectfully urged that the Attorney General cannot usurp power to inflict irreparable injury through a gross abuse of his general discretion in the unusual statutory and factual circumstances of this case. In all the annals of Government there has never been carried out such a shocking contempt for all fundamental principles of fairness as is revealed in the record and findings herein. It is submitted that the Respondents do not have unstoppable power to inflict irreparable injury and damage and that a

Court of equity can use its inherent powers to fashion a remedy[1] which will protect against the administrative tyranny found by the Trial Court in this unusual case.

Even Counsel for the Attorney General believed that the Trial Court possessed the necessary power to prevent irreparable injury from arbitrary action for he repeatedly advised that Court that "... if the Defendants did act unreasonably and arbitrarily, they should be enjoined, we admit that ..." (R. 292) "The Court must then decide ... whether these defendants acted so arbitrarily, so capriciously, so whimsically, that a rational person just couldn't have reached that conclusion. That is the issue in this case." (R. 555) "The whole case is based upon the proposition, outside of constitutionality, that in doing what he did this defendant and the other defendants acted arbitrarily and illegally." (R. 382) There are other such statements by Counsel for the Attorney General in the Record. (R. 7, 9, 10, 26, 27, 90, 122, 123, 268, 294, 295).

Respondents in their Briefs below and in this Honorable Court contended that the District Court had no jurisdiction to review the determinations of probable cause herein and no jurisdiction to determine whether Petitioner's labeling is misleading—but never in their briefs do Respondents change their position on jurisdiction of the District Court to stop irreparable injury from arbitrary abuse of discretion. They apparently agree that there is a distinction between a statutory review and the traditional powers of a

[1] As Mr. Justice Douglas recently said for this Court: "We are dealing here with the requirements of equity practice with a background of several hundred years of history ... The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." *Hecht Company* v. *Bowles*, 321 U. S. 321, 329-330.

Court of equity to grant relief against irreparable injury when arbitrary action is fully proved.

True it is that in his reply argument in this Court, Counsel for the Attorney General in response to a question from the Court reluctantly—very reluctantly—took the position that no matter how arbitrary Respondents were they could not be stopped by any Court. This reluctance shows how abhorrent and unpalatable it is for any lawyer trained in the fundamental principles of fairness inherent in our Bill of Rights to take such a distasteful position.

Even the Congress, when considering the Act involved here, was of opinion that injury from arbitrary action could always be prevented by a Court of equity because in eliminating judicial review of any "act of the Secretary" of Agriculture, (the then chief enforcing officer of the statute) which was "unreasonable, arbitrary, or capricious", the Congressional Committee considering the legislation which became the Act here in question specifically pointed to the "ordinary principle" that this provision was unnecessary because "There is always an appropriate remedy in equity in cases where an administrative officer has exceeded his authority . . ." (House Rept. 2755, 74th Cong. 2nd Sess.).

Obviously the lower Court considered that its traditional equity powers were adequate to prevent arbitrary injury by the Attorney General and his co-respondents, that use of such powers had not been denied by the Congress in such cases, and further that the Administrative Procedure Act[2] removed all possible jurisdictional gaps in enabling the courts to prevent the threatened irreparable injury from the gross abuse of discretion such as found herein.

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[2] 60 Stat. 237; 5 U. S. C. § 1001 *et seq.*; § 1009(e) specifically confers jurisdiction on district courts to prevent injury from "abuse of discretion". It is popular among all Federal agencies to contend this Act does not apply to them but it would be shocking that an Attorney General would claim authority to inflict irreparable injury by arbitrary abuse of discretion and unbelievable that the Congress would not have intended to confer power to give relief when facts such as those found herein are proved by evidence which was largely undisputed.

Under the findings of fact in this case, it is no answer to say that it must be assumed that the administrative officials will act within the proper bounds of discretion. Those Findings, unquestioned by the Majority Opinion, disclose that Respondents have acted arbitrarily and capriciously and not as reasonable men nor as reasonable public officials. While the Majority Opinion authorizes a review of the Administrator's probable cause determinations in the libel courts, it offers no forum in which the Attorney General can be challenged. There should be some Court where even the Attorney General can be stopped from such outrageous abuse and usurpation of power as found herein. The Majority Opinion fails to distinguish review of administrative action provided by statute from the inherent power of courts of equity to inquire into and enjoin unlawful administrative conduct resulting in irreparable injury and multiplicity of unnecessary litigation—a power the existence of which the Congress considered so fundamental that it did not consider it necessary to expressly include such jurisdiction in the Act.

The record shows the Attorney General has been an active participant herein from the beginning of the multiple seizures, so he is, as the final authority, responsible for all the arbitrary actions found by the Trial Court.[3]

An opportunity is now most respectfully requested to present a brief and argument in support of the position that under the unique statutory prerequisites and facts of this case the trial Court was not powerless to aid a party

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[3] The Majority Opinion refers to the requirements which are made specific statutory conditions precedent to the action of the Attorney General when he exercises his "discretion". These are not conditions precedent to the filing of ordinary lawsuits, but Congress prescribed them here because of the disastrous effect of multiple seizures in this field. The Congress in years of debate chiefly about these multiple seizure provisions recognized that multiple seizures are not ordinary lawsuits. The materials before the Attorney General and the discretion he exercises in making his decision to institute multiple seizures are all different from those involved in an ordinary lawsuit filed by the Attorney General under his ordinary discretion. See point 3 *infra*, pp. 8-9.

who has been and is threatened with irreparable injury and damage by arbitrary and capricious action constituting a gross abuse of discretion by the Attorney General of the United States.

2. There is No Review of Probable Cause Determinations by Libel Courts.

It is clear that this Court is of the opinion that Petitioner will eventually be afforded that full and requisite hearing which due process demands for the Majority Opinion states in part:

> "This highly selective manner in which Congress has provided for judicial review reinforces the inference that the only review of the issue of probable cause which Congress granted was the one provided in the libel suit."

But can a review of the issue of probable cause be had in the libel suit? Under the statutory scheme the *sole* issue involved in the libel suit is as to whether Petitioner's labeling is "misleading in any particular." [§ 502(a)]. There is no issue as to whether Petitioner's labeling is *materially* misleading *to the injury or damage of the purchaser or consumer* as determined *ex parte* by Respondents so that multiple seizures can be made, or whether Respondents were not justified in making multiple seizures because arbitrary and capricious in making their *ex parte* determinations or in the manner and number of seizures made. Is there a marked difference between these two issues? Congress itself has given us the answer to this question. A single libel suit is authorized to be brought where the labeling of a product is *misleading in any particular*. But the *sine qua non* of multiple libels is that the Administrator must first determine from "facts found" that the labeling of the product is *misleading in a material respect to the injury or damage of the purchaser or con-*

sumer.[4] Multiple libels are prohibited unless and until this latter condition is met. Congress, recognizing the disastrous effect which multiple libels, as opposed to a single libel, will have upon a business, has thereby intended to make it more difficult for Respondents to institute multiple libels than to institute a single libel. An administrative determination is found to be required as a "necessary prerequisite to multiple seizures." (p. 4 slip opinion).

This Court seems to be of the belief that the question as to whether that prerequisite condition has been arbitrarily determined through an abuse of discretion and whether the seizures were made in such a manner and number as to constitute arbitrary destruction is an issue in a subsequent libel suit. How could the libel court determine whether or not Respondents made their determinations of probable cause in an arbitrary manner and instituted multiple suits through a clear abuse of discretion when Respondents are not nor could they be made parties to the libel suit? Not only are the United States and Petitioner's product the only parties to the libel actions but the Respondents are beyond the reach of the process of any of the libel courts.

To show in the libel action that the probable cause decision emanates from arbitrary, capricious, unlawful and oppressive actions may well aid in convincing a libel court and jury that the Government's attack on the labeling is entirely without foundation, but the libel court in all jurisdictions outside of the District of Columbia will be powerless to grant equitable relief to prevent irreparable injury from such usurpation of power by joining the Respondents as parties. By making no seizures in this District Respondents foreclose all possible remedy.

An ineffective hearing is no hearing at all. A statutory review which provides no adequate remedy is no review. An ultimate victory in the libel courts under the unusual

[4] The claim in the libel papers in the cases filed against Petitioner is that Petitioner's labeling is misleading, *not* that it is misleading to the injury or damage of the purchaser or consumer.

facts of this case would indeed be a hollow triumph as Petitioner's business will have been arbitrarily destroyed before such a case can be tried. In the past equity has always been allowed to furnish a remedy to meet such a situation but in the majority opinion this traditional jurisdiction is denied. It is respectfully submitted that the statute thus interpreted violates the Due Process clause.

3. Seizure Actions Erroneously Treated as Ordinary Lawsuits.

That this is not an ordinary case can hardly be disputed. The conduct of Respondents found to be arbitrary, capricious and oppressive herein is not believed to be the way most Federal officials treat those subject to their statutory powers. In analyzing the effect of multiple seizure actions, the Majority Opinion has erroneously drawn a comparison with and applied principles applicable to the institution of ordinary judicial proceedings. As already stated herein, the statute here is unique in its prescribed conditions precedent to multiple seizures. Baseless multiple seizures by their very nature are not akin to an ordinary judicial proceeding. This fact is well-established in this case (Fdg. 39, R. 769) and by the Congressional history where in years of heated debate over the multiple seizure provisions the Congress repeatedly so stated.[5] Here the impact upon Petitioner's business is final and irrevocable long before any possible trial on the merits. True, the institution of other proceedings may have serious impact. Multiple seizures on a nationwide basis, however, are not only serious in impact but actually sound the "death knell" of a business engaged in the food supplement field because of the unusual public reaction to governmental action. This is particularly so here where the multiple seizures were deliberately lo-

[5] Cavers, *The Food, Drug and Cosmetic Act of 1938—Its Legislative History and Its Substantive Provisions* (1939) 6 Law and Contemporary Problems 2, 13.

cated and planned by Respondents in order to put Petitioner out of business before any trial on the merits.

Upon this Congressional and factual record it is respectfully submitted that the safeguards created by the Congress should not be casually scuttled by treating multiple seizures as ordinary lawsuits and referring those who complain about violation of the safeguards provided in the Act to libel Courts which are helpless to do anything about such violations.

The Majority Opinion has drawn an analogy between a probable cause determination from "Facts Found" under the Act and the action of a grand jury in returning an indictment. However, the differences are obvious. How can an indictment by a grand jury composed of unbiased private citizens be compared to the determinations of these biased administrative officials found by the Trial Court to be deliberately bent on destroying a business which is not violating the law in any respect? Furthermore, the action of a grand jury only authorizes *one criminal suit*, not multiple suits and seizures throughout the Nation. The fact that the only unbiased body to pass upon the position of Respondents herein held they were 100% wrong warrants consideration.

After erroneously concluding that the eleven seizures are no different from ordinary lawsuits, the Majority Opinion states:

> "Consolidation of all the libel suits so that one trial may be had is the relief afforded the distributors of the articles."

Without wishing to belabor the point, Petitioner submits that the Majority Opinion misconceives Petitioner's claim. The question which is the heart of this case is not that of *multiple trials* or even *a trial* but rather the fundamental fairness of *nationwide seizures* instituted for the specific purpose of putting Petitioner out of business before any possible hearing on the merits in any libel Court. Con-

solidation is a purely fictional and illusory remedy for it does not avoid seizures. Furthermore, consolidation does not offer any guarantee from other seizures after consolidation of those filed originally. It is no remedy at all against the multiple seizures threatened herein to destroy Petitioner. To hold otherwise is to substitute fiction for fact.

4. Under the Test Prescribed by the Majority Opinion the Attorney General Has Violated His Congressional Mandate.

The Majority Opinion holds that probable cause determinations under § 304(a) "from facts found" are a jurisdictional condition precedent to the exercise by the Attorney General of discretion to make multiple seizures. The Opinion cites the determinations of Crawford, Larrick and Dunbar as the basis of the multiple seizures made by the Attorney General. These determinations were held to be *unlawful* and *void* by Judge Pine of the United States District Court for the District of Columbia on January 24, 1949, because the named persons had no legal authority to make such determinations. (Fdg. 34, R. 767). The Attorney General did not appeal that decision.

The Majority Opinion does not mention the later determinations of Kingsley, Acting Administrator, but it does not disagree with the findings herein, holding that those determinations were also void since Kingsley acted arbitrarily and capriciously with the only facts before him being those in a survey made by Respondents which found Petitioner's labeling *not* misleading.

This means that the multiple seizures to date have all been held to be null and void as the Attorney General did not comply with the "statutory prerequisite" before he made them. It is these void seizure actions whose prosecution the lower Court enjoined. Since the determinations of Kingsley could not be a "prerequisite" to the multiple seizures already carried out before his determinations were

made, the major question before the special three judge Court related solely to the threats of future seizures on the basis of Kingsley's determinations.

Therefore, the Attorney General has never acquired a valid probable cause determination to use as what the Majority Opinion calls his "necessary prerequisite to multiple seizures"—the thousands of seizures he threatens to make so as to destroy Petitioner's "business prior to any possible adjudication of the disputed issues . . . in any of the libel actions" (R. 769-70).

Since the Majority Opinion states that ". . . the administrative . . . finding is merely the statutory prerequisite to the bringing of the law suit" it would seem that a court of equity acting under its inherent powers and the Administrative Procedure Act should be able to stop the Attorney General's violation of this specific Congressional mandate. What good is the mandate if there is no judicial power to enforce it and thus prevent the very type of injury which the Congress had in mind in writing it into the law? This is particularly emphasized when, as here, consideration by the libel court comes too late to stop the irreparable injury here inflicted and threatened. Only equity can aid, and it is respectfully submitted that equitable jurisdiction should not be denied under these circumstances.

5. Petitioner's Case Is Not Fairly Judged by What May Happen in Hypothetical Cases.

A major foundation stone of the Majority Opinion is the reference to hypothetical cases involving misbranded articles "dangerous to health" and "fraudulent" labeling and it is said "What we do today determines the jurisdiction of the District Court in all the cases in that category."

The reasoning of the Majority Opinion would appear to assume that whenever a suit to enjoin multiple seizures is filed in the District Court, injunctive relief will immediately be forthcoming and the action of the administration stayed.

Petitioner submits that only under the most unusual circumstances would a District Court grant relief in such a cause. If the circumstances are similar to those involved here (and thus reveal administrative action far beyond the fair limits of proper discretion) then fundamental fairness inherent in due process demands that relief be granted. It is difficult to believe the District Courts will make erroneous decisions by not distinguishing the hypothetical cases relied upon by the Majority Opinion and cases like the instant one.

Should this Court tell the Attorney General and his co-respondents that 'arbitrary,' capricious and oppressive action, such as this record shows, will not be tolerated, there will never be another case like this one. They will stop such abusive action and this Court will not have occasion to consider a multitude of similar cases. Placing the Attorney General above and beyond all judicial restraint on the abusive usurpation of power as found in this unique case encourages further excesses. To foreclose forever any *real* remedy against baseless multiple seizures which are solely designed to destroy a business rather than protect the public, places in the hands of the Respondents an unstoppable destructive power unparalleled in the history of this Republic.

Conclusion.

The Majority Opinion eliminates the due process question by giving a review of the *ex parte* probable cause determinations in the libel courts and answers the equitable relief plea by finding that the Attorney General has an unrestrainable power to make multiple seizures no matter how arbitrarily and capriciously he may abuse his "discretion" and no matter how great the irreparable injury therefrom. This is the most far reaching decision ever handed down in the field of administrative law as it gives administrative officials with general powers the right to abuse these powers and destroy private business while at the same time it confers upon them the power to ignore the specific statu-

tory protection provided by the Congress to prevent the exact type of arbitrary and capricious action complained of herein.

This Court has not disputed the correctness of the facts found by the lower court so that they stand unchallenged, and are an almost unbelievable example of Government by arbitrary official action. Nor will the shock which these facts produce upon the American sense of justice be softened one whit by technical jurisdictional considerations based upon "discretion" and "inference" as to Congressional intention from silence.

It is earnestly submitted that if it is held that the courts of the United States are powerless to intervene against an executive agency of the Government in the present situation, then the judiciary has by its own choosing surrendered a substantial part of its traditional power to redress wrongs committed by the Government against its citizens.

It is all the more remarkable that the judiciary should choose to divest itself of this power when the very same officials who are accused have repeatedly urged that if the accusations were proved the Court had the necessary power to grant relief against them.

"The court has jurisdiction to decide if the Administrator acted arbitrarily." (R. 7) "If he has abused his power by acting illegally or capriciously, then, of course, this Court has the power to enjoin him from doing it." (R. 9) "Of course, the Court can decide whether they have acted illegally or arbitrarily. . . ." (R. 295) While these and other such statements to the Court below by the Respondents did not and could not confer jurisdiction upon the Court if none existed, these statements of Respondents' Counsel illustrate that so basic was the agreement and understanding of the Court and the parties below, that the Court had the power to act if the facts were proved that it was not even questioned.

If this Honorable Court is inclined to repudiate the principle announced by the Court in *Monongahela Bridge Co.* v.

United States, 216 U. S. 177 that "the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property," it is urged that the Court first afford Petitioner the opportunity to present to the Court reasons why it should not do so. The unrepresented thousands who must come in contest with government officials in the future who threaten to destroy them by arbitrary action have a vital stake in the action taken by this Court on this petition. For if this Petition is denied, Federal courts of equity will have lost their traditional power to prevent irreparable injury from arbitrary action of Federal officials even where, as here, the Congress thought it was leaving this power undisturbed.

Petitioner urges that the position taken by the Respondents that the lower court did have the requisite jurisdiction to enjoin them if they were guilty of arbitrary action is sufficient reason to justify Petitioner's request, the granting of which will allow the Court for the first time in the proceeding the benefit of a full discussion of this specific jurisdictional issue.

For the reasons set forth herein it is most respectfully submitted that this petition should be granted.

Respectfully submitted,

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CERTIFICATE

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

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